

# The RESPONDENTS Case.

Henry Mickleburgh, Appellant,

AGAINST

Samuel Crispe, Clerk, Respondent.

**T**HAT the Respondent is Rector of *Ellingham*, in *Norfolk*; and the Appellant Lives in the Parish of *Kirby-Cane*, in the said County, and Occupies about 5 Acres of Meadow in *Ellingham*, parcel of his Farm in *Kirby*, and hath fed and depastured upon a Common called *Mickle-Fenn*, in *Ellingham*, containing 200 Acres, above 40 Beasts Yearly, of dry, barren, and unprofitable Cattle, *viz.* working Horses, Colts, Heifers and Hogs; and having paid the Respondent no Tythes for the same for 8 Years, he brought his Bill in the

*Easter Term, 1707.* Exchequer for the Tythes of the Feed of the said Cattle, and for the Tythe Herbage of the Meadow Ground, or a *modus* of 2 d. per Acre, paid in lieu thereof.

*Michaelm. Term, 1707.* The Appellant by his Answer, insists on a *modus* of 2 d. per Acre, for the said Meadow Ground, which he is ready to pay; and as to the Common called *Mickle-Fenn*, he saith it extends into *Kirby-Cane*, *Gelston* and *Ellingham*, and the Feed is worth 10 s. per Acre per *Annum*; and that the Inhabitants of those Parishes and also of *Stockton*, are Inter-commoners, and feed promiscu-

*Nota.* This cannot be, ouly, and so have done time out of mind; and he hath fed thereon about 15 Heifers, 7 Horses and unprofitable, and Hogs, from about *May* to *Michaelmas*, yearly; and that the Inhabitants of the respective Parishes, have time out of mind paid Tythes for the Cattle fed upon the Great Waste, to the Incumbent of the Parish where the Owner of such Cattle lives, and where the Cattle in the Winter Season are kept; and that he hath paid Tythes for such Cattle, to the Incumbent of *Kirby-Cane*, where he lives, and to the Incumbent of *Stockton*, where his other Farm is. And that he hath two parcels of Dole Lands, lying in *Gelston* Common, where he hath a Right to feed Cattle, and cut Alders, and cannot come at those Lands, without driving over the said Common in *Ellingham*, and believes his Cattle, that have been frequently driven on to those Parcels, might go from thence to that part of the Common in *Ellingham*, called *Mickle-Fenn*, to which his Doles lye open.

*Replication.*

The Respondent by his Replication, submitted to accept the *modus* of 2 d. per Acre for the Meadow Ground, and replied generally to the rest of the Answer; and Witneses on both Sides being Examined,

*21 July, 1709.*

The Cause was heard; upon which it appeared, by very full Proofs on the Respondents Part, that the Appellants Cattle did not Stray on to the Common of *Mickle-Fenn*, or feed there as Inter-commoners, but were yearly driven by the Appellant from his House at *Kirby-Cane*, about a Mile and half distance, over *Kirby* Common, and thro' the Common of *Gelston*, which lies between *Kirby-Cane*, and the Common of *Mickle-Fenn*, in *Ellingham*, and there keeps them the Summer Season, and drives them back the same Way in the Winter; and that the Benefit of such Feed, was worth to the Appellant 8 l. per *Annum*.

*Decree.*

And the Appellant having not by Proofs, made out his Case to be as is set forth in his Answer, the Court decreed the Appellant to account for the Tythes of the Cattle depastured on *Mickle-Fenn*, and also for 2 d. per Acre, for the Meadow Land.

*Which Decree the Respondent humbly hopes is Just and Reasonable, and that the same will be affirmed by this Honourable House, and that the Respondent shall have his Costs for this Vexation.*

*Nota.*

THE CATTLE of the Appellant, for which the Tythes are Decreed, are dry, barren, and unprofitable Cattle, and are not by Law Tythable to the Minister of the Parish, where the Owner lives, for the time they were fed in the Respondents Parish, but to the Respondent, as Minister of the Parish where they are fed; and the Suggestion in the Appellants Appeal of Payment of double Tythes, is groundless; and if the Respondent should not have Tythes for the feed of these Cattle upon the Lands within his Parish, the Respondents Herbage of all the Pasture-Land within his Parish, might be eaten by the Cattle of Out-sitters, without any Satisfaction to him for the same; and there would be a *non Decimando* for the feed of the Appellants Cattle, for the time they were fed in the Respondents Parish, because for that time the Minister of the Parish, where the Appellant lives, can have no pretence of Right or Title to the Tythes thereof.

*William Ettricke,  
Con. Phipps.*